

claims arising from administrative failings. At least it may be argued that courts could well indulge in an assumption opposite to that which they now make in applying judicially created immunities: In the absence of a congressional declaration that specified immunities are to be accorded an agency, the acts of such units will be subject to the rules of law commonly applied in litigation involving private parties.

JUDICIAL DETERMINATION OF MORAL CONDUCT IN CITIZENSHIP HEARINGS

The dilution of personal liberties in other parts of the world has made United States citizenship an increasingly desirable element of personal status. As a result, our naturalization requirements have become of vital importance to many aliens who have been admitted to this country and who are seeking citizenship. Quite possibly the most perplexing standard which must be met is that of "good moral character."¹

Aware of the problems of a stranger from another community seeking recognition in a new environment, our courts and immigration authorities must apply this standard to arrive at a definition of "good morals" which will be just to the applicant and healthy for our society. A striking example of the complications which ensue from the attempted application of the standard is *Repouille v. United States*.²

In the *Repouille* case an appeal was taken from an order of a district court granting Repouille's petition for naturalization. The order was reversed and the petition was dismissed without prejudice. The reversal turned on the court's determination that the petitioner had not conducted himself as a person of good moral character during the five years before he filed his petition. The facts shown were that on October 12, 1939 the petitioner had deliberately put to death his son, a boy of thirteen, by means of chloroform. The child had "suffered from birth from a brain injury which destined him to be an idiot and a physical monstrosity malformed in all four limbs. The child was blind, mute, and deformed. He had to be fed; the movements of his bladder and bowels were involuntary, and his entire life was spent in a small crib."³ Toward his other

¹ 34 Stat. 598 (1906), 8 U.S.C.A. § 707 (a)(3) (1942). Most decisions on good moral character are made at the administrative level by the Immigration and Naturalization Service under 8 C.F.R. (Supp., 1947) §§ 353.1-353.3. There has been considerable disagreement concerning the periods of time which a court may survey and consider in making its decision concerning character. Some have held, as the statute provides, that the court is restricted to the five years immediately preceding the date of the petition. *Petition of Zele*, 140 F. 2d 773 (C.C.A. 2d, 1944). Others have inquired into the whole life history of the applicant in order to ascertain his true character and inclinations. *In re Taran*, 52 F. Supp. 535 (Minn., 1943). It seems clear that the requirement of good moral character survives the filing date of the petition and persists until and including the date of final hearing. *United States v. Palmeri*, 52 F. Supp. 226 (N.Y., 1943).

² 165 F. 2d 152 (C.C.A. 2d, 1947).

³ *Ibid.*, at 152.

four children Repouille had always been dutiful and responsible; the children were entirely dependent upon him for support. Repouille was indicted for manslaughter in the first degree; the jury found him guilty of manslaughter in the second degree and recommended "utmost clemency." Repouille was sentenced to five to ten years, execution to be stayed, and was placed on probation from which he was discharged in December 1945.

Judge Learned Hand said the phrase "good moral character" in the Nationality Act set as a test "whether 'the moral feelings, now prevalent generally in this country,' would 'be outraged' by the conduct in question: that is, whether it conformed to 'the generally accepted moral conventions current at the time.'" He recognized the difficulty of applying the test "in the absence of some national inquisition, like a Gallup poll," but concluded that "quite independently of what may be the current moral feeling as to legally administered euthanasia, we feel reasonably secure in holding that only a minority of virtuous persons would deem the practice morally justifiable, while it remains in private hands, even when the provocation is as overwhelming as it was in this instance."⁴ Judge Frank felt that the court was not justified in substituting its impression of the "generally accepted moral conventions" for that of the district judge, since the circuit court was in no better position than the district court to determine current public opinion on the private practice of euthanasia. He expressed the opinion that the correct statutory test is the attitude of "ethical leaders" but went on to say that the precedents in his jurisdiction compelled a decision based on contemporary public opinion. This might be ascertained by remanding to the district judge for a new hearing at which the parties could adduce reliable information on current mores.⁵

Both judges agreed that the decision should not be based on judicial predilection and that under the existing law they were bound to abide by public opinion; but they were in disagreement over the correct statutory test. While Judge Hand believed reference should be made to "the generally accepted moral conventions current at the time," Judge Frank favored reference to "ethical leaders." By either technique the judge is ineligible to make the final decision.

Granting for the moment that such judicial restraint is desirable, one may nevertheless question the referent which Judge Hand adopts. It is a little surprising that he spoke interchangeably of moral feelings being "outraged" and "the generally accepted moral conventions current at the time." According to Mr. Gordon Connelly of the National Opinion Research Center⁶ it is conceivable

⁴ *Ibid.*, at 153. Ironically, if Repouille had delayed filing his petition from September 22 to October 14, 1944 he would have had a clear record for the full five-year period and would have been admitted without question. But the consequences of this decision were not unduly harsh, for the court practically "invited" Repouille to file another petition, saying "that the pitiable event, now long passed, will not prevent Repouille from taking his place among us as a citizen." 165 F. 2d 152, 154 (C.C.A. 2d, 1947). Even if he were naturalized, it is not clear that the petitioner could enjoy his full political rights since, by the law of New York, persons convicted of a felony are disfranchised. N.Y. Election Law (McKinney, 1943) c. 17, § 152.

⁵ 165 F. 2d 152, 154-55 (C.C.A. 2d, 1947).

⁶ Presently at the University of Chicago.

that a large segment of society may not approve of a given act but still may not be so "outraged" as to demand that the actor forfeit his chance for citizenship. Put another way, while Judge Hand may have correctly established the current public attitude toward euthanasia, it does not necessarily follow that those who believe euthanasia morally objectionable would deny citizenship to one who commits it under the circumstances in the *Repouille* case.

As a matter of fact, recent cases show an attempt to correlate the public attitude toward the petitioner's conduct with his potentialities for making a good citizen.⁷ Only a short time before the *Repouille* case Judge Learned Hand found that an alien's marriage to his niece was not contrary to the generally accepted moral conventions and, hence, did not involve "moral turpitude."⁸ Although the marriage was probably incestuous by the laws of every state in the union, he considered as controlling that the Catholic Church, of which both parties were communicants, had approved the marriage; the couple had four children and apparently lived a model family life; and there had been no familial intimacy between the uncle and niece, since they had met only eighteen months before their marriage. Society would probably agree that this man deserved citizenship. But contrast an earlier deportation case in which the "wife" and child of an American citizen were sought to be deported as aliens likely to become public charges. The citizen was married to a niece in Russia; she was a pauper, and an idiot child had been born of the marriage. By the law of Russia the marriage was valid, but by the law of Pennsylvania the marriage was incestuous. The court concluded that since the marriage was invalid, the "wife" and child had not obtained derivative citizenship. In ordering deportation, Judge McPherson asserted that he was applying the public standard of morality: "Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here and to see that such an objectionable example is not presented to the public."⁹ The factors which prompted this conclusion are apparent. While, generally speaking, society would unhesitatingly condemn marriage between an uncle and niece, probably few would say that the court was not correct in granting citizenship in the *Francioso* case and denying it in the *Rodgers* case.

⁷ Perhaps a higher standard of morality is required for naturalization than is expected of the ordinary citizen. For instance, while a citizen must be convicted of a felony to be disfranchised, an alien need not be guilty of a felony to be considered as lacking good moral character. *United States v. Bergman*, 47 F. Supp. 765 (Cal., 1942), reversed on other grounds 144 F. 2d 34 (C.C.A. 9th, 1944); see *In re Paoli*, 49 F. Supp. 128 (Cal., 1943). However, no generalization can be made without an extensive comparison of cases, a task which is not within the scope of this note.

⁸ *United States v. Francioso*, 164 F. 2d 163 (C.C.A. 2d, 1947), noted 96 U. of Pa. L. Rev. 584 (1948); cf. *Petition of R—*, 56 F. Supp. 969 (Mass., 1944); *In re Paoli*, 49 F. Supp. 128 (Cal., 1943).

⁹ *United States ex rel. Devine v. Rodgers*, 109 Fed. 886, 888 (D.C. Pa., 1901).

On another occasion a petitioner's military service record and his presumed ignorance of his unlawful conduct convinced the court that he was of good citizenship stock. Rubia, the petitioner, was a native-born Filipino, a coast guardsman serving his sixth consecutive enlistment. He presented six honorable discharge certificates under a statutory provision making such certificates *prima facie* evidence to satisfy the requirements of residence and good moral character. The government objected that Rubia was not of good moral character because for six months he and a married woman had been living together as man and wife. Rubia was unaware of the woman's marital status. It was insisted that since by Florida statutes, adultery is ground for divorce and living in an open state of adultery is punishable both by imprisonment and fine, Rubia's action completely overthrew the *prima facie* effect of the service and honorable discharge certificates. The court thought otherwise: "In view of applicant's long record of efficient and honorable service to the United States and the presumption of good moral character which attends that record, and in view of the testimony of the case which contains no word of adultery but only of a living together as 'man and wife,' the District Judge may well have found that applicant, in ignorance of the barrier which prevented their being lawfully joined as man and wife, had lived with the woman as 'man and wife,' believing himself to be living in a lawful, though informal, relation."¹⁰ Thus, even though society condemns adultery, it is still possible for an adulterer to obtain citizenship. One might conclude from these cases that the primary consideration is not whether the petitioner has deviated from the generally accepted mores of the community but whether he has deviated sufficiently to forfeit his right to citizenship.

Although the question of "good morals" can be sufficiently narrowed to get the public reaction on the petitioner's eligibility for citizenship, there remains the task of getting an accurate sample of the current reaction. Judge Hand's suggestion of a general poll of public opinion is not without merit. One such poll conducted by the American Institute of Public Opinion in June 1947 showed a considerable percentage, though not a majority, of the populace in favor of legal euthanasia. The question asked: "When a person has a disease that cannot be cured, do you think doctors should be allowed by law to end the patient's life by some painless means if the patient and his family request it?" The results were: Yes, 37%; No, 54%; No Opinion, 9%.¹¹ Because a majority were opposed to

¹⁰ *United States v. Rubia*, 110 F. 2d 92, 93 (C.C.A. 5th, 1940). Accord: *Petitions of Rudder*, 159 F. 2d 695 (C.C.A. 2d, 1947). Contra: *Calo v. United States*, 79 N.E. 2d 619 (Ill., 1948); *Jaselski v. United States*, 79 N.E. 2d 621 (Ill., 1948).

¹¹ Release by the American Institute of Public Opinion for June 21, 1947. In 1937 and 1939 the Institute found 46% in favor, 54% opposed. Slightly more men, 39%, than women, 35%, favor the practice. There is a sharp difference in attitude by ages:

Age	Yes	No	No Opinion
21-29	46%	47%	7%
30-49	36%	54%	10%
50 and over	33%	58%	9%

legal euthanasia, it seems Judge Hand correctly decided that society, speaking generally, would also condemn the practice in the hands of a private individual. But because such a large percentage favored the practice, we might infer that society "as a whole" would not be so "outraged" by the act as to deny citizenship to one who performs it.

It is doubtful, however, whether a general poll on the question of public morals is really helpful. The opinions expressed in recent polls on legal euthanasia vary according to age, economic status, sex, and education.¹² The recent study by Kinsey, *Sexual Behavior in the Human Male*,¹³ shows an astonishing diversity in the moral standards of the community, varying with differences in educational, religious, economic, political, and sociological influences. No generalization can be made about the standard of public morality. But perhaps the most serious shortcoming of the poll is the off-the-cuff nature of the answers received. The pollster can hardly give each person interviewed time to give a reasoned reply, yet, by the nature of the question, much painstaking thought is required for an intelligent answer.¹⁴

Since a deliberative answer is desired, it seems that the use of a jury would be preferable to a general poll. The jury is convenient to use and represents a cross-section of society. Of course, the fact that naturalization is largely a matter of administrative law may be reason enough for not using a jury. But when a statutory provision based solely on public morals is involved, one might expect to find that the traditional device for keeping the judge in step with the man on the street would be used. The jury need not encroach upon the discretionary powers vested in the judge by the Naturalization Act,¹⁵ because its function would be advisory.

In Philadelphia, The Evening Bulletin, April 16, 1948, reported a poll on the same question: Yes, 36%; No, 50%; Qualified Answer, 6%; No Opinion, 8%. The feeling against euthanasia is much stronger among low-income people than among those of average or above average income. It is much stronger among people with little education than among college graduates. The Minneapolis Tribune, November 2, 1947, reported: Yes, 36%; No, 55%; Depends, 3%; No Opinion, 6%. The breakdown by educational levels of people favoring euthanasia in Minneapolis: College, 38%; High School, 41%; Grade School, 26%. For a recent article urging adoption of the proposed Euthanasia Bill in New York see James, Euthanasia: Is "Merciful Release" Wrong? Reader's Digest 105-7 (June 1948).

¹² Note 11 *supra*.

¹³ See especially 327-483 (1948).

¹⁴ It is extremely difficult to correlate the many ramifications of the problem of public morality into something approaching a definitive answer. Consider how Morris R. Cohen starts with the "[religious] taboo in the prohibition of any form of euthanasia or suicide, no matter how hideous or tortured life becomes" and proceeds to show that, "despite the depth of this religious fear of touching the gates of life and death," we consistently touch the life and death of certain Orientals by excluding them from our country and confining them to inadequate lands where many of them starve and that we condemn controlling birth and death rates but do not condemn the "wholesale death-dealing and birth-prevention of war." Cohen, *The Faith of a Liberal* 356-57 (1946). Undoubtedly, there are other "ethical leaders" who would violently disagree with Cohen's position and argue just as persuasively that these are not inconsistencies.

¹⁵ 54 Stat. 1140, 1156 (1940), 8 U.S.C.A. §§ 701, 734 (1942). "The primary purpose of the naturalization laws is to grant citizenship only to those who, it appears, will make good Americans, and the court is in the best position to determine whether this is so in any given case." *In re Paoli*, 49 F. Supp. 128, 131 (Cal., 1943).

The requirement of deliberation might seem to be even more satisfactorily met by using an advisory group of "ethical leaders" in accord with Judge Frank's suggestion. Several objections to the use of a large group are apparent. Although presumably a "poll" of the ethical leaders could be made, it should be noted that the answer will be in terms of what men ought to think rather than necessarily what men do think. Furthermore, if the question is an interesting one, the area of dispute among ethical leaders may well be so great as to make the polling technique inappropriate.¹⁶ Finally, there remains the problem of identifying the ethical leaders. But these difficulties lose force if only a few such leaders are consulted. Perhaps the use of higher standards would be a desirable tendency; and the problem of variations in standards vanishes with the use of fewer experts. Finally, whoever the ethical leaders may be, clearly the judges are among them. Of our judges, probably none are better qualified than Judges Hand and Frank, and yet both of them agreed in the *Repouille* case that, however the decision was to be made, it was not to be made by them. In the last analysis, any dependence by the judge on a standard outside himself in determining the question of good moral character in naturalization cases is likely to be unwise when not altogether futile.

¹⁶ Kinsey, *Sexual Behavior in the Human Male* 327-483 (1948); Cohen, *op. cit.* *supra* note 14.